In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 55

AMERICAN AIRLINES, INC., PETITIONER

v.

NORTH AMERICAN AIRLINES, INC., AND THE CIVIL AERONAUTICS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE CIVIL AERONAUTICS BOARD RESPECTING POSSIBLE MOOTNESS

The Solicitor General, on behalf of the Civil Aeronautics Board, respectfully calls to the Court's attention certain new facts which raise a question of possible mootness in this case, now awaiting briefing and argument on the merits. Respondent's air carrier operating authority has been terminated since the granting of certiorari herein, and neither respondent nor any of its affiliates appears to be engaged in activities which are violative of the Board order involved in this case. This change of circumstances raises the question of possible mootness which is discussed in this memorandum.[1]

[1] For the Court's convenience, the Appendix, *infra*, p. 11, contains a chronological table of the pertinent events.

I

Respondent, together with three other registered irregular air carriers and a promotional company, and four individuals who controlled them were the original members of a venture known as the North American Combine. Taking its name from respondent, the combine as an entity engaged in air transportation under the name of North American Airlines.[1]

On November 4, 1953, the Board found that respondent's use of the name North American in air transportation violated § 411 of the Civil Aeronautics Act, 49 U. S. C. 491, since it had created substantial public confusion between petitioner and respondent, who were competitors in air transportation (R. 200–201). It ordered respondent, its successors, assignees, agents, etc., to "cease and desist from engaging in air transportation under the names of North American Airlines, Inc., North American Airlines, North American, or any other name which includes the word 'American'." (R. 230.)

On petition for review, the court below reversed the Board's order. 228 F. 2d 432. On April 23, 1956, this Court reversed, and remanded the case to the Court of Appeals for a determination as to the adequacy of the record upon which the finding of substantial public confusion was based. 351 U. S. 79.

---

[1] Respondent was incorporated under the name Twentieth Century Airlines, Inc. It changed its name to North American Airlines, Inc. on March 3, 1952.

Therearter, in May 1956, and as a consequence of an injunction obtained by an aircraft company forbidding the use by respondent and its affiliates of the name "North American" (*North American Aircoach Systems, Inc., et al.* v. *North American Aviation, Inc.*, 231 F. 2d 205 (C. A. 9), certiorari denied, 351 U. S. 920), the combine abandoned the use of that name and, drawing upon the corporate name of another of its members, Trans American Airways, Inc., engaged in air transportation as Trans American Airlines.[3]

Upon remand pursuant to this Court's decision of April 23, 1956, the court below, on July 12, 1956, affirmed the Board's order insofar as it required respondent to cease and desist from using the names North American Airlines, Inc., North American Airlines, or North American in its air transportation operations. Taking cognizance of the change of name to Trans American, the court, *sua sponte*, raised the question of the scope of the Board's order and reversed it insofar as it forbade respondent from engaging in air transportation under any name which would include the word "American." 235 F. 2d 863. On January 28, 1957, this Court granted certiorari to review this disposition of the case by the Court of Appeals. 352 U. S. 988.

Meanwhile, on July 1, 1955, the Board had issued its Order No. E-9360 in an enforcement proceeding

[3] Prior Board approval of this name change was not obtained pursuant to the Board's Business Name Regulation, 14 CFR § 291.28, which requires permission for use of a name other than the one in which a carrier's operating authority is issued.

against the respondent and the other original members of the combine (*Twentieth Century Airlines, et al. Compliance Proceeding,* Docket 6000). The Board (1) revoked the four carriers' letters of registration as large irregular carriers; (2) ordered the combine, its successors and assigns, to cease and desist from engaging in air transportation; (3) ordered the four carriers (including respondent), their successors and assigns, all both collectively and individually, to cease and desist from engaging in air transportation directly or indirectly and from violating § 408 of the Act; and (4) ordered North American Aircoach and the four individuals, their successors and assigns, all both collectively and individually, to cease and desist from engaging in air transportation in violation of § 401 and/or from violating § 408 of the Act. This order became effective on June 6, 1957, following its affirmance by the court below (*North American Airlines* v. *Civil Aeronautics Board,* 240 F. 2d 867) and denial of certiorari by this Court (353 U. S. 941).

A fifth registered irregular carrier, Unit Export Company, Inc., was found by the Board to have been acquired by the individuals and utilized in the operations of the combine. However, since this occurred subsequent to the institution of the compliance proceeding, its registration was not revoked nor was it named in any portion of the cease and desist order.

According to the information now available to the Board, the corporate carriers (including respondent herein) have not been dissolved, and none of the members except Unit Export is authorized to engage in air transportation. Unit Export, to our knowledge, is

not using a name including the word American.[4] A new corporation, known as Twentieth Century Aircraft, Inc., has been formed, having as its principal officers three of the individual members of the North American combine. This company, doing business as Twentieth Century Airlines, is alleged to be engaged in non-common carrier operations for the military.[5] It is using aircraft previously operated by the combine. This company is also alleged to be doing maintenance work for other carriers. The only other visible aeronautical activity on the part of any member of the combine appears to be the lease of its DC–6B aircraft to Eastern Air Lines.

II

In the light of these facts, the question arises whether this case is now moot. In our view, it is not moot and should not be treated as such.

A. It is settled that cessation of the allegedly illegal conduct by a respondent and those acting in concert with it does not, of itself, render moot litigation to review the validity of the administrative order forbidding their conduct. *United States* v. *W. T. Grant Co.*, 345 U. S. 629; *Federal Trade Commission* v. *Goodyear Co.*, 304 U. S. 257; *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290.[6] In particular,

[4] In order to engage in air transportation under a name other than that in which its letter of registration is issued, a carrier must secure prior Board approval. 14 CFR § 291.28.

[5] The Board's economic regulatory jurisdiction extends only to common carriage by aircraft.

[6] See also *Walling* v. *Helmerich & Payne*, 323 U. S. 37; *Walling* v. *James V. Reuter, Inc.*, 321 U. S. 671; *Mitchell* v. *Joyce Agency, Inc.*, 348 U. S. 945; *Mitchell* v. *C. W. Vollmer*

this Court has held that the discontinuance of violations by voluntary agreement (*Walling* v. *Helmerich & Payne*, 323 U. S. 37), or by completion of the work involved in the particular litigation (*Mitchell* v. *C. W. Vollmer & Co., Inc.*, 349 U. S. 427), or by dissolution of the corporate employer (*Walling* v. *James V. Reuter, Inc.*, 321 U. S. 671; *Mitchell* v. *Joyce Agency, Inc.*, 348 U. S. 945) does not, by itself, moot the controversy. This is true even though these circumstances, arising subsequent to the issuance of the order under review, "indicate that the need for it may be less than when made." *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 271.

Rather, the vitality of the case is measured by a practical evaluation of the possibility of future recurrence of the challenged practices or of further proceedings based upon the administrative order. Recurrence must not be impossible. *United States* v. *Hamburg-American Co.*, 239 U. S. 466, 475. Nevertheless, there need not be a "cognizable danger * * * [a] mere possibility * * * serv[ing] to keep the case alive." *United States* v. *W. T. Grant Co., supra*, 345 U. S. at p. 633. It is enough that the administrative order "may to some extent" be the basis for further proceedings, "the exact extent it is unnecessary to define." *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 515. Here, a

---

& Co., Inc., 349 U. S. 427; *National Labor Relations Board* v. *Mexia Textile Mills*, 339 U. S. 563, 567-8; *National Labor Relations Board* v. *Crompton-Highland Mills, Inc.*, 337 U. S. 217.

recurrence of the conduct forbidden by the Board's order is possible, even though that conduct might be proscribed by other regulatory provisions such as the Board's Business Name Regulation.

Moreover, principles favoring continued life of a controversy "may be applied in fuller measure in furtherance of the public interest * * * than if only private interests were involved." *Walling* v. *Reuter Co.*, 321 U. S. 671, 674–675. The "public interest in having the legality of the practices settled" when coupled with a "mere possibility" of recurrence "militates against a mootness conclusion." *W. T. Grant Co., supra*, 345 U. S. at 632.

This approach is recognized as particularly appropriate where the Court's decision will operate as a guide to the public agency if it is required to take further action in the same matter, *Walling* v. *Haile Gold Mines*, 136 F. 2d 102, 105 (C. A. 4), or in future similar matters. *Walling* v. *Mutual Wholesale Food & Supply Co.*, 141 F. 2d 331, 334–335 (C. A. 8); *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498; *Boise City Irr. & Land Co.* v. *Clark*, 131 Fed. 415 (C. A. 9).

In this respect, the present case takes on special significance because, being a case of first impression, 351 U. S. at p. 82, it can be anticipated that it will affect the future administration of a statutory provision dealing with "a field where Congress was specifically concerned to protect the public interest," a field involving matters "of obvious national public concern." 351 U. S. at p. 84. The lower court has denied to the Board the power generally recognized

to exist in other public agencies to issue an order sufficiently broad to prevent recurrence of conduct which creates public confusion, in the apparent belief that "secondary meaning" is a prerequisite to such an order. As matters now stand, the applicable criteria have been confused by the injection of these private law concepts into proceedings looking to the vindication of the public interest and in a case in which, in the light of past conduct, resumption of the activity is entirely possible.

In the Board's opinion, these considerations, taken in combination, militate against a conclusion of mootness. *United States* v. *W. T. Grant Co., supra,* 345 U. S. at p. 632.

B. Should the Court determine, however, that this controversy has become moot, we believe that the correct disposition would be to vacate the judgment of the Court of Appeals only insofar as it reversed that portion of the Board's order which forbade respondent's use of the word "American" in whatever name it might use to conduct its air transportation operations. This disposition is supported by the Court's discussion in *United States* v. *Munsingwear,* 340 U. S. 36.

The practice prescribed by *Munsingwear* is designed to permit relitigation of the issues by eliminating a judgment "review of which was prevented through happenstance" so that a "decision which in the statutory scheme was only preliminary" is prevented "from spawning any legal consequences." 340 U. S. at pp. 40, 41. Insofar as it affirmed various provisions of the Board's order, the judgment below has

not become unreviewable "through happenstance" nor is it "only preliminary." On the contrary, it has become unreviewable through respondent's decision not to seek its review by this Court. Far from being only preliminary, that portion of a judgment which is adverse to a litigant who does not seek its review is immune from attack by him in certiorari proceedings challenging the remaining portions of the judgment which are favorable to him. *Federal Trade Commission* v. *Pac. Paper Assn.*, 273 U. S. 52, 66. Because of respondent's decision not to file a cross-petition for certiorari, those parts of the Board's order which were sustained by the court below (as well as the findings upon which they were based) have received the full measure of judicial review to which they are susceptible. Accordingly, as to that part of the judgment, none of the reasons calling for application of the *Munsingwear* rule exists, and it should be permitted to have the legal consequences which normally flow from any final judgment. If this controversy is moot, only those portions of the judgment below which have been called into question by petitioner should be vacated.

III

There remains the question of whether the Court should proceed further with this case, even if it is not regarded as moot. Cf. *National Labor Relations Board* v. *Textile Workers Union of America*, 352 U. S. 864. We suggest that, for the reasons set forth under Part II, *supra*, it would be appropriate, now that certiorari has been granted, to dispose of the

case on the merits rather than to vacate the writ because this particular respondent has ceased to act as an air carrier. On the other hand, the Court may consider that the developments subsequent to the grant of certiorari have deprived the case of sufficient general importance to warrant review. We recognize that determination of this matter rests peculiarly within the Court's discretion.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

FRANKLIN M. STONE,
General Counsel,
Civil Aeronautics Board.

AUGUST 1957.

APPENDIX

Chronology of Relevant Administrative and Judicial Proceedings Involving Respondent

Date	Proceeding
11-4-53	Civil Aeronautics Board Order No. E-7870 issued, forbidding respondent, its agents, successors, assigns, etc., using name North American or any other name including word American in air transportation.
6-23-55	Court of Appeals for District of Columbia Circuit reversed Board's Order No. E-7870. 228 F. 2d 432.
7-1-55	Civil Aeronautics Board Order No. E-9360 issued, revoking respondent's letter of registration and forbidding it, its successors and assigns, from engaging in air transportation.
9-28-55	Court of Appeals for Ninth Circuit affirmed District Court order forbidding respondent to use name North American. 231 F. 2d 205.
11-14-55	This Court granted certiorari to review decision of court below reversing Order No. E-7870. 350 U. S. 894.
4-23-56	This Court reversed decision of court below which had reversed Order No. E-7870, and remanded case for further proceedings. 351 U. S. 79.
4-30-56	This Court denied certiorari to review decision of Court of Appeals for Ninth Circuit. 351 U. S. 920.
7-13-56	Court below, on remand from this Court, affirmed part of Order No. E-7870, and reversed that part forbidding respondent to use any name including word "American" in its air transportation operations. 235 F. 2d 863.
12-20-56	Court below affirmed Order No. E-9360. 240 F. 2d 867.
1-28-57	This Court granted certiorari to review decision of court below partially reversing Order No. E-7870. 352 U. S. 988.
4-22-57	This Court denied certiorari to review decision of court affirming Order No. E-9360. 353 U. S. 941.

U. S. GOVERNMENT PRINTING OFFICE: 1957